

Pinehurst Village Station
Pinehurst, North Carolina

Docket No. A2011-49

MOTION OF PETITIONERS JOHN AND BETTYE MARCUM FOR AN ORDER
SUSPENDING THE DECISION TO CLOSE PINEHURST STATION

(October ^, 2011)

Our revised petition filed August 23, 2011, appealed the Postal Service's decision to close Pinehurst station. In that petition, we asked for suspension of the Postal Service's decision pending our appeal. We now renew our request for suspension.

The postal station in Pinehurst, North Carolina is more than a century old, and the only small post office in the country that is a registered National Landmark. Closing it doesn't serve any of the purposes that underlie the various Postal Service initiatives that are now underway to close thousands of low-revenue, money-losing retail facilities. Even though there is another post office within two miles of historic Pinehurst station, keeping the landmark Pinehurst facility open is a win/win outcome. It would be a win for Pinehurst because until recently, when it was padlocked, historic Pinehurst station drew over a thousand daily visits of Pinehurst boxholders and retail counter users to the historic district, reliably drawing foot traffic into the small but vibrant downtown business district. More importantly, at least for purposes of this appeal, keeping historic Pinehurst station open would be a financial boon for the Postal Service itself. Our September 23 brief (together with the September 28 errata notice to that brief) demonstrates the high probability that, by closing Pinehurst, the Postal Service would incur increased delivery costs and reduced box rents totaling an estimated \$325,000. This dwarfs the \$66,000 that the Postal Service estimates it would save in salary and space costs by closing historic Pinehurst station.

The ground for our renewed request for suspension of the Postal Service's decision to close Pinehurst station is that the Commission has recently definitively

stated that the procedural protections of 39 U.S.C. 404(d) apply to stations and branches, not just the retail facilities that meet the technical definition of “post office” as the Postal Service has chosen to define that term.¹ We are aware that the Commission’s definitive statement that the procedural protections of section 404(d) extend to patrons of stations and branches was made in a notice proposing new regulations to implement section 404(d). It is important to note that although the new implementing regulations have yet to be adopted, the Commission has made a *currently valid “determination” that patrons of stations and branches are protected by section 404(d)*. If the Commission’s interpretation of section 404(d) in Order No. 814 is correct, patrons of stations are now (and always were) protected by section 404(d).

Even though, as patrons of historic Pinehurst station, the Commission has concluded that we have a right of appeal, we have no real protection if we do not receive the kind of notice that section 3001.117 currently makes available to patrons of “post offices” (in the technical sense that the Postal Service uses that term) and do not have an opportunity in conjunction with our filing of an appeal to seek suspension of the Postal Service’s decision to close. Order No. 814 has already established the principle that the protections of section 404(d) apply to patrons of stations and branches. Therefore, current rule 3001.117 should serve as a relevant guide to determining what threshold level of notice to patrons of stations and branches would be adequate until updated notice rules that reflect Order No. 814 are adopted and in force. Current rule 3001.117 identifies a level of notice for patrons of post offices that is slated to be closed that is the minimum level necessary to vindicate a section 404(d) right of appeal, whether the term “post office” is defined narrowly, as the Postal Service would prefer, or broadly, as the Commission would prefer.

¹ In Order No. 814, for purposes of review of decisions to close post offices, the Commission proposed to define “post office” broadly as “a Postal Service operated retail facility.” Order No. 814 definitively states that this proposed definition and the notice requirements that flow from it reflect “the Commission determination that patrons of any Postal Service operated retail facility may appeal a Postal Service determination to close or consolidate that facility.” *Id.* at 9.

With respect to its decision to close historic Pinehurst station, it is clear that the Postal Service fell far short of the notice requirements of rule 3001.117. That section requires that the Postal Service post the documents that comprise the administrative record both at the facility to be closed (Pinehurst station) and the facility that will inherit the functions of the closed facility (the Pinehurst Main Post Office). As of September 26, 2011, the undersigned confirmed first-hand that no such documents have been posted at either facility. Unless the patrons of Pinehurst station are doomed to have a right without a remedy, they should be afforded a right to have the decision to close suspended if notice has fallen short of a reasonable standard, such as the standard contained in rule 3001.117.

Also, in considering its decision to close historic Pinehurst station, it is clear that the Postal Service has violated the provisions of the National Historic Preservation Act, Public Law 89-665, 16USC470. The Pinehurst station has been the cultural and business center of the village for over a century and is the main magnet that draws residents to the village center. We have been informed by USPS officials in Charlotte and Washington, and by the historical authorities that this is the only National Landmark District post office, and it's the only one ever to be proposed for closure. Section 106 of the Act requires careful weighing of the cultural and historic, as well as economic, impacts on the village and this was not done.

The Postal Service failed to consult with the Pinehurst Historical Commission, the NC State Historical Protection Office, the National Park Service, or with the President's Advisory Commission on Historic Preservation, as required by the National Historic Preservation Act. As these organizations can verify, they have been unable to arrange any cooperative consultations. Willful and knowing violations of this nature of the NHPA can only serve to undermine the objectives of this law and the hamper the oversight the President's Advisory Commission.

It is also clear that the closing of Pinehurst station will have and is already having a devastating impact on Pinehurst's small business district. Numerous businesses

protested the closing and its damaging impact on their businesses in their responses to the Postal Service's questionnaire. The Postal Service brushed this evidence aside, sending each of these businesses a uniform response that arbitrarily asserted that "there would be no impact on the business district" (See unredacted responses in the Postal Service's submission of the administrative record). Since then, most businesses are already able to document and quantify significant losses to their normal cash flow and operations resulting from the abrupt loss of foot traffic in the town center that immediately followed the closing of Pinehurst station. Virtually all businesses in the business district have now written to petitioners to join in support of their appeal and urge suspension of the Postal Service's decision.

Order No. 814 acknowledges that patrons of stations have appeal rights under Order No. 814. Having acknowledged those rights, the Commission should attempt to secure those rights in a meaningful way. This should include a right to obtain a suspension of the decision to close, such as that acknowledged in rule 3001.117 with respect to "post office" closings. We move that the right to secure a suspension acknowledged under rules 3001.114 and 3001.117 be extended to the patrons of historic Pinehurst station immediately.

Every day that Pinehurst station remains closed, more of its former patrons will lose hope that the appeal will succeed, and will make an irrevocable decision to opt for home delivery and install their own curbside box rather than rent a box at the Pinehurst Main Post Office. As is apparent from our brief, each former Pinehurst box holder that opts for home delivery causes a net revenue loss to the Postal Service, since it loses box rental revenue (averaging \$100 per year) and incurs the additional cost of curbside delivery (averaging \$225 per year). Our informal survey of the community indicates that roughly 1,000 former patrons of Pinehurst station have chosen to trade rented boxes for curbside delivery. That represents an annual per-patron loss of \$325. If the Postal Service's estimate that \$66,000 in salary and facility costs would be saved each year by closing Pinehurst station is correct, the net revenue loss for former box holder who opts

for curbside delivery (beyond the approximately 1,000 former Pinehurst patrons who have already made this choice) would be $\$325-66 = \$ 259$. The longer Pinehurst station remains closed, the more both historic downtown Pinehurst and the Postal Service stand to lose. Further, as noted above, the Pinehurst station does not fit within the stated objectives of the USPS closure program. It is a profitable busy station with a unique historical designation and as such its reopening would in no sense undermine the USPS closure program.

Obtaining a suspension of the decision to close Pinehurst station would impose only a minor burden on the Postal Service. Historic Pinehurst station is owned by the Postal Service. Reopening it would not involve a lease that would have to be re-instated. Reopening would require little more than having former staff turn the lights back on and remove the padlock from the front door.

The undersigned move that the Postal Service's decision to close historic Pinehurst station be suspended for defective notice of the existence of appeal rights under section 404(d), and that the documents that comprise the administrative record in this proceeding be posted on the front door of Pinehurst station and the front door of the Pinehurst Main Post Office as would have been required under rule 3001.117.

Attached to this motion is an analysis of the legislative history of the Randolph Amendment that was enacted as current 39 U.S.C. section 404(d). It confirms the reasonableness of the Commission's determination that the appeal rights of section 404(d) include Postal Service decisions to close stations and branches.

(signed)

John Marcum

Bettye Marcum

Petitioners

THE SCOPE OF CURRENT 39 U.S.C. SECTION 404(d)

For the reasons explained below, the legislative history of section 404(d) leaves ample room to interpret the phrase “post office” in section 404(d) as inclusive of all retail postal facilities.

39 U.S.C. section 404(d) is the source of the current right of patrons of a “post office” to appeal a Postal Service decision to close that facility. This statutory provision originated as the Randolph Amendment to H.R. 8603, the bill that was enacted as the 1976 amendments to the Postal Reorganization Act.

The precursor to the Randolph Amendment to the Postal Reorganization Act was a similar provision that Senator Randolph proposed when introducing S. 3082, in the preceding Congress. That amendment to existing 39 U.S.C. section 404 read:

(b)(1) The Postal Service, prior to making a determination under subsection (a)(3) as to the necessity for the closing or consolidation of any post office, shall—

(A) hold a public hearing on the record at such time and in such place as will insure that any person served by such post office is given an adequate opportunity to present his views on such proposed closing or consolidation; and

(B) provide adequate notice at least 60 days prior to such hearing of the intention of the Postal Service to consider the closing or consolidation of such post office and of the date, time, and place of such hearing to persons served by such post office to insure that such persons will have an opportunity to attend and present their views at such hearing.

(2) The Postal Service, in making a determination whether or not to close or consolidate a post office, shall consider—

(A) any oral or written testimony presented at the hearing held under paragraph (1);

[the rest of the provision is identical to the Randolph Amendment]

This unenacted provision authored by Senator Randolph addresses an issue that is closely related to the one addressed in the Randolph Amendment, but distinct from it. The focus of Senator Randolph's provision that he proposed as part of S. 3082 was two-fold. He wanted the Postal Service to have to justify closing independently managed small-town post offices (those with their own postmaster). He also wanted it to justify its policy, as Senator Randolph viewed it, of downgrading the status of independent small-town post offices to that of branches under the management of a postmaster of an adjacent urban post office. This is his statement explaining the purpose of the unenacted precursor to the Randolph Amendment:

Congress does not want indiscriminate closing of our rural and small town post offices. The decision has also been made to create branches out of many post offices close to large cities. This would transfer a community oriented post office into one administered through the instructions and directives of large city postmasters with little or no community involvement. This plan will erode the identity so important to people who wish to maintain a heritage of mutual interest. 122 Cong. Rec. S6314 (March 11, 1976) (statement of Senator Randolph).

Senator Randolph continued:

It is important that the independence and integrity of communities continue and that good mail service is maintained. To insure this, I introduced legislation, S. 3082, on Thursday, March 4, to provide for an open and participatory review of Postal Service changes. Under this legislation the U.S. Postal Service must substantiate any proposal to change or eliminate **independent post offices**. 122 Cong. Rec. S6314 (March 11, 1976) (statement of Senator Randolph).

The remedy that Senator Randolph proposed when the Postal Service places the status of an independent post office at risk was to make available to patrons of an independent post office a highly robust right to hearing and review. Before deciding to close or consolidate a post office, the Postal Service would have had to hold “a public hearing on the record” and “provide adequate notice at least 60 days prior to such hearing” to ensure that postal patrons can attend and express their views.² S. 3082 also would have required the Postal Service consider “any oral or written testimony presented at the hearing” when deciding whether to close or consolidate a post office. *Id.* at S6316.

In comparison to the unenacted provision in S. 3082, the Randolph amendment that became part of the 1976 amendments to the Postal Reorganization Act [current section 404(d)] was considerably diluted. Instead of being routinely required to hold “a public hearing on the record” whenever it decides to close a post office, the Randolph Amendment only requires the Postal Service to notify patrons at least 60 days before closing or consolidating any post office. This leaves it to patrons to take the initiative to appeal such closings. Also, under the Randolph Amendment, the Postal Service is not obligated to consider “any oral or written testimony presented” at such hearings.

² *Id.* at S6315-16.

In explaining the purpose of the Randolph Amendment to H.R. 8603 (H.R. 8603 became the 1976 amendments to the Postal Reorganization Act), Senator Randolph stated during the Senate debate on the Conference Report:

It is gratifying that the conferees approved with a modification my proposal to stop the indiscriminate closing and consolidation of post offices throughout the Nation. Under this amendment, the Postal Service must consider citizen comments on a local basis. Rural areas and small towns in West Virginia and throughout the country will have the assurance of a fair and thorough review prior to the closure or consolidation of **any postal facility.**" 122 Cong. Rec. S14966 (August 31, 1976) (emphasis added).

He further stated:

In the Senate-passed bill, a patron of the office could appeal the decision to any U.S. court of appeals within 30 days. The court could affirm or reverse the decision or return it to the Postal Service for further consideration. It was in this provision that a modification was made by the conference. The appeal was changed from the court of appeals to an administrative appeal to the Postal Rate Commission. The Commission would be required to adhere to the same standards and **have the same authorities as** contained in the original Senate appeals provision. 122 Cong. Rec. S14966.

It is evident that the appeal rights in what ultimately became the Randolph Amendment were watered down considerably from those in his proposed amendment to S. 3082 and those proposed in the Senate version of the Randolph Amendment itself. The Senate version of the Randolph amendment would have authorized patrons of a closed post office to take an appeal directly to the Federal Circuit Court. In the version of the Randolph Amendment that was adopted in conference, that right was scaled back to a right of appeal to the Postal Rate Commission. By stating that the appeal rights of section 404(d) apply to the closure or consolidation of "any postal facility," Senator

Randolph appears to have acquiesced in the drastically watered down form of appeal in exchange for a broadening of the retail facilities to which these weakened appeal rights would apply.

Senator Randolph was not alone in interpreting the scope of the appeal rights contained in section 404(d) as inclusive of all retail postal facilities. Other Congressmen debating the Conference Report confirmed that understanding, whether or not they supported the amendment. For example, in commending the conferees for including the Randolph Amendment, Representative Buchanan stated:

I commend the [conferees] for including language about closing **branches**, because in my district what was involved, without any notification or any notice to their own advisory board, [the Postal Service was] about to close some 27 branches in an urban area and make other radical changes, with no advance warning, with no consultation, with no chance for people to have a hearing on the matter. I had to go to Federal court to stop it. That certainly ought not to happen over and over again, so I am glad that the [conferees] included that language. 122 Cong. Rec. H9702 (Sept. 10, 1976)

Similarly, in criticizing the conferees for including the Randolph Amendment, Senator Fong stated:

If the Postmaster should decide that he will close a **station**, he can be taken to court. When we passed the postal reorganization bill we wanted to give the Postmaster a free hand, but we told him to follow certain guidelines in these small post offices, and he should not go helter skelter in closing post offices willy-nilly. I think he has been pretty fair and reasonable in closing and consolidating post offices. In this amendment he can be taken to court for a decision as to whether it was right for him to close a post

office or not. The court could reverse him.” 122 Cong. Rec. S14278 (Aug. 23, 1976) (emphasis added).

The understanding that the regulation of small post office closings under the Postal Reorganization Act, including the Randolph Amendment, applied to all retail postal facilities was shared by the Postmaster General. In response to a request by Senator Randolph to the Postal Service for its views on post office closings, Benjamin Bailer (then Postmaster General) replied by letter that

The Service has approached the problem of closing small post offices with care. The Service is well aware of the provisions in Title 39 which require that no **postal facility** be shut down solely for operating at a deficit.” Letter from Benjamin Bailer, Postmaster General, United States Postal Service, to Gale McGee, Chairman, Senate Committee on Post Office and Civil Service (June 10, 1976) (reprinted in 122 Cong. Rec. S14268 (Aug. 23, 1976) (emphasis added).

In the quote above, the Postmaster General is referring to 39 U.S.C. § 101(b), which states, “No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress that effective postal services be insured to residents of both urban and rural communities.”

The Conference Report for H.R. 8603 directly addresses the issue of the scope of the Randolph Amendment. It states that the conferees “intend that [section 404(b)] apply to **post offices** only and not to **other postal facilities**.” Conference Report at 18 (emphasis added). The Postal Service has argued that this statement resolves the issue. Comments of the United States Postal Service Regarding Jurisdiction Under (Current) Section 404(d), April 19, 2010 at 9. In effect, it argues that the phrase “other postal facilities” should be read to mean “other *retail* postal facilities,” even though that clarification isn’t in the Conference Report. In the Postal Service’s

view, this remark in the Conference Report embraces the views of Senator Fong and others that the Randolph Amendments went too far in awarding appeal rights.

The word “retail,” however, does not appear as a modifier of the term “postal facilities” in the cited passage of the Conference Report. What Congress meant by “other postal facilities” remains ambiguous. “Other postal facilities” could, for example, refer to non-retail facilities. As the Commission has stated, “it is reasonable to assume that the words ‘other [postal] facilities’ refer to units other than retail facilities, such as mail processing centers or vehicle maintenance facilities.”³ Because of the statements of Senators Randolph and Fong, and Congressmen Buchanan, during the debate on the Conference Report that the Randolph Amendment applies to stations and branches, the Commission’s interpretation of the quoted passage in the Conference Report has some credibility. We urge the Commission to act on its view of the scope of the Randolph Amendment and order suspension of the Postal Service’s decision to close Pinehurst station.

“[

³ See Docket No. A83-30, Commission Opinion Remanding Determination for Further Consideration – 39 U.S.C. § 404(b)(5), January 18, 1984, at 5.